87-13
DOCKET NO.

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

RUSSELL EUGENE CHARLTON,

Appellant,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

ALBERT L. FARY, JR., ESQUIRE
218 London Boulevard
Portsmouth, Virginia 23704
(804) 399-6521

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Due Process Clause protects the petitioner against criminal conviction where the evidence against him was an alleged confession that he knew the cocain was there, but it was not his and thereby constitutionally insufficient?

2. Whether the search of the small tin pill box exceeded the scope of the search warrant and therefor was an unreasonable search in violation of the Fourth Amendment of the Constitution of the United States?

3. Whether the Due Process Clause protects the petitioner against criminal conviction of a second offense of possession of marijuana a first class misdemeanor punishable by a year in jail and/or a $1000.00 fine either or both when there is absolutely no evidence of a prior conviction of possession of marijuana?

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IN THE SUPREME COURT OF THE UNITED STATES

RECORD NO.

RUSSELL EUGENE CHARLTON,
Petitioner,

vs

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, Russell Eugene Charlton, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Virginia rendered in this proceeding April 15, 1987, denying his petition for appeal from a final order of conviction and sentencing of the Circuit Court of the City of Chesapeake, Virginia on January 9, 1986.

OPINION BELOW

The order appealed from was the April 15, 1987 order of the Supreme

Court of Virginia refusing the petition for appeal, by the current petitioner, from an order of the Court of Appeals of Virginia of August 28 1986, ruling that petitioner's conviction in the Circuit Court of the City of Chesapeake and sentencing him to five years in the penitentiary suspended, conditional upon him serving ninety (90) days in jail for possession of methamphetamine in violation of Section 18.2-205 of the 1950 Code of Virginia and a concurrent ninety (90) days in jail for possession of marijuana, second offense in violation of Section 18.2-250.1 of the 1950 Code of Virginia, was proper and denying an appeal thereof.

Those orders are reproduced in the Appendix hereto.

Petitioner was convicted by the Circuit Court of the City of Chesapeake, Virginia on January 9, 1986 of the

crimes of 1) possession of methamphetamine and 2) possession of marijuana, second offense, and sentenced to confinement in jail. copies of which Orders are made a part of the Appendix hereto.

JURISDICTION

Jurisdiction of this Court is invoked for certiorari to the final judgment of the Supreme Court of Virginia, this Court of last report of the Commonwealth of Virginia of April 15, 1987, denying petitioner's request to appeal. and affirming the criminal convictions and sentences to confinement by the Circuit Court of the City of Chesapeake, Virginia. The statutory provision believed to confirm jurisdiction in this Court to review the judgment in question is 28 V.S.C. Sec 1257 (3).

CONSTITUTIONAL PROVISIONS

This case invokes application of the

Fourth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. The Nature of the Case and Proceedings Below.

Russell Eugene Charlton was indicted by the Grand Jury of the Circuit Court of the City of Chesapeake on one count of possession of methamphetamine in violation of Section 18.2-250 of the Code of Virginia and a class 1 misdemeanor possession of marijuana second offense in violation of Section 18.2-250.1 of the Code of Virginia. At a bench trial on November 25, 1985, the Honorable Russell I. Townsend, Jr., found him guilty of both charges and the matters were continued to January 9, 1986 for sentencing and a presentence report ordered.

Charlton was sentenced on January

9, 1986 to five (5) years suspended conditional upon his serving ninety (90) days in jail on the possession of methamphetamine and a concurrent ninety (90) days in jail for possession of marijana, second offense.

The petitioner has timely appealed to the Court of Appeals of Virginia, the Intermediate Appellate Forum and to the Supreme Court of Virginia, the Court of last resort. All petitions thereto for appeals have been denied.

Review of the judgment of the Supreme Court of Virginia is sought. The federal questions sought to be reviewed herein were timely raised in the Trial Court and the Supreme Court of Virginia.

2. Statement of Facts.

On or about April 23, 1985, the defendant had purchased some furniture and other articles from Mrs. Stuart when

the Stuarts and their baby were moving to California. He also stored some of their belongings awaiting their instructions.

Mr. and Mrs. Stuart did not stay in California and returned on May 22, 1985 and demanded all of their furniture and belongings back.

On June 2, 1985, Mrs. Charlton went to the Chesapeake Magistrate and obtained an unlawful detainer warrant naming certain property that the defendant was refusing to return.

On June 3, 1985, Mrs Stuart went to the Police and made a complaint of grand larceny of these same articles and based upon her statement that the articles were taken on May 23, 1985, a warrant and search warrant were obtained on June 4, 1985, from the Chesapeake Magistrate.

When the search warrant was executed on June 4, 1985, Detective Anderson,

claiming to be looking for two 14K gold necklaces. opened a Tupperware lunch box that contained a small tin pill container. Inside the pill container was a baggie containing .09 grams of what the Detective said was cocaine. (T13)

The defendant allegedly, after being advised of his "rights" by "I suppose a miranda card said, when asked by Detecttive Anderson if the cocaine was his," that he knew it was there, but it wasn't his, it came with the crate. (T16)

Detective Anderson admitted that because of the small quanity, .09 grams, that he could not have told that it was in the box, stating "Something was in there wobbling" and when asked "but it didn't sound like any gold chain" he said "Didn't know what it was inside there." (T18-19)

Detective Anderson testified that the defendant said "He knew there was

cocaine in there, but it wasn't his, it came with the crate." (T20)

The Commonwealth placed into evidence exhibit #1, an analysis of the substance seized which turned out to be marijuana and, methamphetamine instead of cocaine, and the warrant was amended in the preliminary hearing to conform to the different drug.

Cathy Fain, the defendant's girlfriend, testified that she had lived at 647 Benefit Road for about a year and she had witnessed part of the transaction involving the various articles purchased etc. from Mr. and Mrs. Stuart on April 23, 1985 and she along with four others testified that the Coca-Cola crate and tupperware lunch box were among those articles. (T57)

Mrs. Fain testified that the marijuana residue (roaches) that comprised the Commonwealth's evidence of marijuana

possession were hers and that she had left them there that morning when she went to South Carolina because her grandfather died.

She indicated that she had put some of the defendant's belongings in the Coca-Cola crate when she was cleaning up.

The defendant testified that he had never looked inside the Tupperware box and denied that he ever said, "Yes, I knew it was in there, but wasn't mine, they came with the crate." Detective Williams who allegedly advised the defendant of his rights and was present in the dining room (T15 & 16) when the defendant addegely made this "confession", never corroborated Detective Anderson's version nor did he testify to rebut the defendants version wherein Detective Anderson's version was categorized as a lie. (T60)

There was never any evidence introduced by the Commonwealth to show any prior conviction of the defendant for possession of marijuana.

There were no drugs found on the person of the defendant.

There was no evidence of fingerprints offered by the Commonwealth to show that the defendant ever touched the Tupperware box, the tin pill box or the plastic baggie.

ARGUMENT

(1) Whether the Due Process Clause of the Fourteenth Amendment protects the petitioner against criminal conviction where the evidence against him was an alleged confession that "he knew the cocaine was there, but it wasn't his" and thereby constitutionally insufficient.

A conviction which is without evi-

dence to support it, or even a conviction that is only supported by some evidence and is plainly wrong, is offensive to the protection of the Due Process Clause.

The petitioner urges that the only evidence that even tends to support his criminal conviction is the uncooperative testimony of Officer Anderson, that the petitioner admitted that he knew the "cocaine" was there but that it was not his.

Does this even prove that the petitioner possess much less knowingly and intentionally possessed methamphetamine? Beyond a reasonable doubt?

The Police Officer thought the substance was cocaine and after the drug report came back had to ammend the warrant to charge methamphetamine instead of cocaine as originally charged.

In a prosecution under Section 18.2-

250 [1]ownership or occupancy of premises or vehicle upon or in which a controlled substance is found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

The petitioner urges that even if he had made the statement it, nor none of the other evidence much less, proved that he possessed knowingly or intentionally possessed cocaine (really methamphetamine) or exercised any dominion or control over it as required by the law.

A person might know that his wife or girlfriend possesses illegal drugs in a dwelling that they share but without anything more that does not make him guilty of knowingly and intentionally possessing the drugs.

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[1]Section 18.2-250. Possession of

2. Whether the search of the small tin pill box exceeded the scope of the search warrant and therefore, was an unreasonable search in violation of the Fourth Amendment to the Constitution of the United States?

A search that exceeds the limits of a proper limited search ostensibly for certain listed personal belongings and two 14K gold chains is converted into a general exploratory search prohibited by the Fourth Amendment (United States vs Belcher, 577 F Supp 1241 (1983) If Officer Anderson had probable cause to believe the two or even one gold chain was in the pill box he would be justified but when he shook it "he could not tell what was in there by his own admission,

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footnote continued

controlled substances unlawful. - A. It is unlawful for any person knowingly or

therefore, he had no probable cause but believe that he would find the gold chain or chains in the small tin box.

The search must be one directed in good faith toward the object (gold chain) specified in the warrant. It must not be a general exploration search. Gerleski vs United States, 405 F zd 253 (5 Cir 1968); Terry vs Ohio, 392 U.S. 1, 22 (88 Sct 1868, 1880, 20 LED 2d 889) 1968.

The motion to suppress should have been granted and the evidence excluded.

3. Whether the Due Process Clause protects the petitioner against criminal conviction of a second offense of possession of marijuana a first class mis-

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footnote continued

intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to,

demeanor punishable by a year in jail and/or a $1000.00 fine either or both when there is absolutely no evidence of a prior conviction of possession of marijuana?

Under Section 18.2-250.1 [2] of the 1950 Code of Virginia, a first offense carries a maximum fine of $500.00 and a maximum of thirty (30) days in jail either or both while a second or subsequent offense shall be punishable as a class 1 misdemeanor or $1,000.00 fine maximum and maximum one (1) year in jail either or both.

There was no evidence of any prior

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footnote continued

a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (Section 54-524.1 et seq.).

conviction of possession of marijuana offered by the Commonwealth. There was no evidence that the petitioners had any knowledge of or exercised any dominion or control over the marijuana.

Cathy Fain the person that had shared the dwelling with the defendant for 1 ½ years, came into Court and admitted that the marijuana was hers and not the petitioner's.

There is no presumption allowed from the ownership or occupancy of the dwelling and therefore there is no evidence credible or otherwise to support a conviction for possession of marijuana second offense.

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footnote continued

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was

Therefore, the insufficiency of the evidence outlined above is tantamount to be a denial of due process of petitioner's criminal conviction is based solely thereon and allowed to stand.

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footnote continued

was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

(a) Any person who violates this section with respect to any controlled substance classified in Schedules I or II of the Drug Control Act shall be guilty of a Class 5 felong.

(b) Any person other than an inmate of a penal institution as defined in Section 53-19.18 or in the custody of an employee thereof, who violates this section with respect to a con-

footnote continued

trolled substance classified in Schedule III shall be quilty of a Class 1 misdemeanor.

(b1) Violation of this section with respect to a controlled substance classified in Schedule IV shall be punishable as a Class 2 misdemeanor.

(b2) Violation of this section with respect to a controlled substance classified in Schedule V shall be punishable as a Class 3 misdemeanor.

(c) Violation of this section with respect to a controlled substance classified in Schedule VI shall be punishable as a Class 4 misdemeanor.

(B) The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies when possession of a controlled substance or substances is

footnote continued

necessary in the performance of their duties. (Code 1950, Section 54-524.101: 2; 1972, c. 798; 1973, 64; 1975, cc. 14, 15; 1976, c. 614; 1978, cc. 151, 177, 179; 1979, c. 435; 1980, c. 285.)

[2]Section 18.2-250.1. Possession of marijuana unlawful. - A. It is unlawful for any person knowingly or intentionally to possess marijuana unless the substance was obtained directly form, or pursuant to, valid perscription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorizied by the Drug Control Act (Section 54-524.1 et seq.).

Upon the prosecution of a person for violation of this section, ownership or occupancy of premises or vehicle upon or in which marijuana was found shall

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footnote continued

not create a presumption that such person either knowingly or intentionally possessed such marijuana.

Any person who violates this section shall be guilty of a misdemeanor, and be confined in jail not more than thirty days and a fine of not more than $500.00, either or both: any person, upon a second or subsequent conviction of a violation of this section, shall be quilty of a Class 1 misdemeanor.

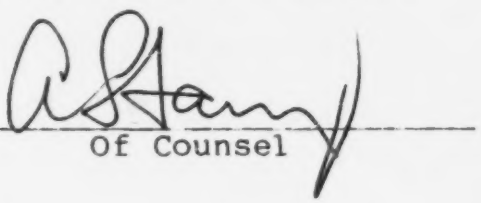
B. The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies when possession of marijuana is necessary for the performance of their duties.(1979, c. 435.)

CONCLUSION

For the foregoing reasons, the petitioner respectfully submitts that this Petition for a Writ of Certiorari to this Honorable Court should be granted.

Respectfully submitted,

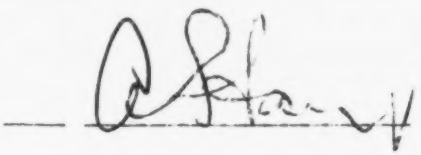
RUSSELL EUGENE CHARLTON

BY: 
Of Counsel

Albert L. Fary, Jr.
Counsel for Petitioner
218 London Boulevard
Portsmouth, Virginia 23704

CERTIFICATE OF SERVICE

I, Albert L. Fary, Jr., counsel for petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 12 day of June, 1987, I mailed three copies of the foregoing Petition for Writ of Certiorari to Robert Kowalski, Commonwealth's Attorney for the City of Chesapeake, the Respondent.



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA, :

vs : Indictment Nos. 85-994 & 85-1118

RUSSELL EUGENE CHARLTON, :
Defendant. :

Stenographic transcript of the testimony introduced and proceedings had in the above-entitled cause in said Court on November 25, 1985, before the Honorable Russell I Townsend, Jr. Judge of said Court.

-----oOo-----

APPEARANCES: Mr. Stephen Givando-Cline, Assistant Commonwealth's Attorney

Mr. Albert L. Fary, Jr. Attorney for the Defendant

JAMIE & ASSOCIATES
Registered Professional Reporters
Virginia Beach, Virginia

MR. FARY: We can just introduce that into evidence, can't we?

MR. GIVANDO-CLINE: That crate itself, we don't have it here.

MR. FARY: You-all had it in lower Court, didn't you.

MR. GIVANDO-CLINE: May have. We don't have it today.

BY MR. GIVANDO-CLINE:

Q. What kind of crate was it?

A. Wooden crate.

Q. The Tuppperware thing was right on top of the crate; is that your testimony?

A Yes, sir.

Q What did you find inside of the Tupperware lunch box?

A Inside the Tupperware lunch box

was a small tin pill container. Inside there was a baggie containing a white power substance, which I suspected at that time to be cocaine.

Q Did you confiscate that baggie?

A Yes, sir.

DIRECT EXAMINATION

BY MR GIVANDO-CLINE:

Q Having explained his rights to him via, I suppose, a Miranda card --

A Yes, sir.

Q -- did the defendant indicate he understood his rights and go on to make a statement?

A He advised he understood them. I then asked him about the suspected cocaine which was found in the Tupperware lunch box. I asked him if the cocaine which was his. He stated he knew the cocaine was in there, but it wasn't his, it came with the crate. Mr. Charlton then claimed ownership to all the items in the crate except for a pair of sunglasses and the Tupperware lunch box.

Q Did he tell you where the crate came from?

A From the other merchandise --

I don't remember the people's names.

Q Now, you say you were searching for some small items of jewelry?

A Yes, sir.

Q There were only two items of jewelry you were searching for, two gold chains; is that correct?

A Right. Yes, sir.

Q How long was this small tin pillbox?

A Around three inches long and-- in that area like that.

Q Where is the pillbox?

A In the evidence locker.

Q You don't have it here today?

A No, sir.

Q And what was the only thing that was in there?

A There was some residue seeds in the pill box container as well as the baggie of white power substance which I

suspected to be cocaine.

Q How much was the actual weight of the white power substance that was in there?

A .09 grams.

Q .09 grams.

A Yes, sir.

Q Could you have told that that was in there by just shaking the box?

A Without looking inside, no, sir.

Q It appeared then that the box was empty when you shook it, because there was such a small amount of weight in there?

A Something was in there wobbling. There was seeds in there also.

Q But it didn't sound like any gold chain?

A Didn't know what it was inside there.

18/19

Q And you asked him about the cocaine?

A Yes, sir.

Q And you thought it was cocaine?

A Yes, sir.

Q And he said it was not his?

A He stated that he knew there was cocaine in there, but it wasn't his, it came with the crate. He claimed ownership of all the items except for a pair of sunglasses and the Tupperware lunch-box container.

Q When you arrived there, he told you he bought this stuff from Mr. and Mrs. Stewart, didn't he?

A He didn't tell me that. He might have told some other detective that. He didn't tell me.

Q You don't remember hearing him say he had a receipt that he paid for this stuff?

A No, sir.

Q You don't recall that at all?

A No, sir.

BY MR. FARY:

A They hadn't.

Q Do you see anyone bring in a Coca-Cola box?

A Yes.

Q Do you recall who the person was that brought it in?

A Billy Smithson.

Q Do you know or did you ever look inside that box to see what was in the box?

A I saw a Tupperware bowl.

Q Do you remember seeing anything else in there?

A I think it was some magazines or something in it, too.

Q Do you know where that article was placed in Mr. Charlton's house?

A In the den.

Q Did you see it there at any time after that?

A Yes.

Q Did it look like it had been disturbed in any way?

A No.

DIRECT EXAMINATION

BY MR. FARY:

Q Do you know anything about the substance that was in that tin container that was inside that Tupperware box?

A No, sir.

THE COURT: Had you ever seen it before.

THE WITNESS: No, sir.

MR. FARY: Answer any questions the Commonwealth has or the Court.

CROSS EXAMINATION

BY MR. GIVANDO-CLINE:

Q Tell me, Mr. Charlton, if you never looked inside the Tupperware box. you never been inside that tin container, then how was it when the detective asked you if you knew that the drugs were in there, you replied, "Yes, I knew

it was in there, but they weren't mine, they came with the crate"?

A I never said that.

Q So we have a detective who has lied, apparently; correct?

A Apparently.

Q Okay. Now, all the other items that he asked you about that were in the crate you admitted ownership of as well, did you not?

A No, sir.

Q So he lied about that, too?

A If that's what he said.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE on the 9th day of January, 1986.

COMMONWEALTH,

vs

RUSSELL EUGENE CHARLTON, Defendant.

ORDER - Felony No. 85-1118

This day came again the Attorney for the Commonwealth, and Russell Eugene Charlton, who stands convicted for a felony, to-wit: Possess Methamphetamine, appeared according to the condition of his recognizance and came also Albert L. Fary, attorney for the accused.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open Court with a written report, which report he presented to the Court in open Court in the presence of the defendant who was fully advised of

the contents of the report and a copy of said report was also deliver to counsel for accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in tis case.

Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced

against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary of the Commonwealth for the term of Five (5) years.

And being of the opinion that it is compatible with the public interest so to do, the Court doth Adjudge and Order that the imposition of sentence is suspended on serving 90 days in jail, concurrent to case no. 85-944, and the said defendant is hereby placed on probation under the supervision of a Probation officer of this Court during his good behavior for an indeterminate period upon release from confinement, and upon condition that the said defendant do pay the costs assessed against him.

The Court certifies that all times

during the trial of this case, the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

The defendant noted an appeal from the judgment of the Court is allowed to remain on bond pending said appeal.

Enter: January 9, 1986

Russell I. Townsend, Jr.
Judge

A copy Teste: Lillie M. Hart, Clerk

BY: _____

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE on the 9th day of January, 1986.

COMMONWEALTH

vs.

RUSSELL EUGENE CHARLTON, Defendant.

ORDER - Misdemeanor No. 85-994

This day came again the Attorney for the Commonwealth, and Russell Eugene Charlton, who stands convicted for a misdemeanor, to-wit: Possess Marijuana-Second Offense, appeared according to the condition of his recognizance and came also Albert L. Fary, attorney for the accused.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open Court with a written report, which report he presented to the Court in open Court in the presence of

the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and no-

thing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the jail of this City for the term of Ninety (90) days and a fine of $500.00.

The Court certifies that at all times during the trial of this case the accused was personally present and his attorney was likewise personally present and capably represented the defendant.

The defendant, by counsel, noted a appeal from the judgment of the Court, and is allowed to remain on bond pending said appeal.

Enter: January 9, 1986

Russell I. Townsend, Jr.
Judge

A Copy, Teste: Lillie M. Hart, Clerk

By: _____, D.C.

VIRGINIA:

In the Court of Appeals of Virgina on Friday the 4th day of April, 1986.

Russell Eugene Charlton,

against Record No. 0060-86-1
Circuit Court No. 85-994

Commonwealth of Virginia,

From the Circuit Court of the City of Chesapeake

Before Judges Baker, Coleman and Hodges

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the panel is of opinion to deny the petition for appeal for the following reasons:

On appeal of a conviction, we must consider the evidence in the light most favorable to the commonwealth, granting to it all reasonable inferences fairly deducible therefrom. Evans v. Common-

wealth, 215 Va. 609, 612, 212 S.E. 2d 268 (1975). When the sufficiency of the evidence is attacked, as here, the judgment of the trial court sitting without a jury is entitled to the same weight as a jury verdict and will not be disturbed by us unless plainly wrong or without evidence to support it. Id. at 613. Here, the validity of the search warrent is not challenged. It is the extent of the search of which complaint is made. The reason given by the officer for searching the canister supports the finding of the trial court that the search was constitutional.

From its review of the record, the panel concludes there was evidence to support the verdict of the trial court.

A Copy,

Teste:

BY:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 15th day of April, 1987.

Russell Eugene Charlton, Appellant,

against Record No. 860924
Court of Appeals No. 0060-86-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

BY:

Deputy Clerk

87-13

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

DOCKET NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL EUGENE CHARLTON,

Petitioner.

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Stephen Givando-Cline
Assistant Commonwealth Attorney
City of Chesapeake
P.O. Box 15225
Chesapeake, VA 23320

Counsel for the Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

RUSSELL EUGENE CHARLTON

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO A WRIT

OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

THE COMMONWEALTH OF VIRGINIA, by counsel, respectfully opposes Petitioner's writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER'S CONVICTION OF POSSESSION OF METHAMPHETAMINE VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT BECAUSE THE EVIDENCE AGAINST HIM INCLUDED AN ADMISSION THAT, WHILE THE DRUG WAS NOT HIS, HE KNEW IT WAS IN HIS HOUSE.

2. WHETHER THE SEARCH OF A SMALL METAL CONTAINER EXCEEDED THE SCOPE OF THE SEARCH WARRANT AND, THEREFORE, WAS AN UNREASONABLE SEARCH IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

3. WHETHER THE PETITIONER'S CONVICTION OF A SECOND OFFENSE OF POSSESSION OF MARIJUANA VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

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PREVIOUS COURT OPINIONS

The Petitioner has adequately stated the previous court opinions.

UNITED STATES SUPREME COURT JURISDICTION

The Respondent does not believe the United States Supreme Court has jurisdiction to consider the matters raised by the Petitioner in Questions One (1) and Three (3). The Respondent concedes the Court's jurisdiction to consider the matter raised in Question Two (2)

CONSTITUTIONAL PROVISIONS

The applicable constitutional provisions have been stated by the Petitioner.

STATEMENT OF THE CASE

The evidence on behalf of the Respondent showed that on June 14, 1985, an officer of the Chesapeake Police Department, while executing a search warrant for the Petitioner's residence at

647 Benefit Road, Chesapeake, Virginia, discovered a clear plastic baggie containing a substance later determined to be methamphetamine. This baggie was hidden inside a three-inch long metal canister which was itself concealed inside a larger plastic container. (T.18) When the police first observed the plastic container, it was sitting on an open-topped wooden crate that was located in the Petitioner's den or living room. (T.12) A payment book for an automobile loan in the Petitioner's name was lying on the plastic container. (T.12). Numerous items belonging to the Petitioner were found in the wooden crate.

Before he opened the metal canister, the police officer shook it and determined that something was loose inside. (T.19) The officer testified

that when he opened the canister he was looking for an item of jewelry described in the search warrant as a gold chain. (T.11,19).

After Russell Eugene Charlton had been advised of his constitutional rights, he was questioned on two occasions concerning the seized drug. Initially, he stated he knew the "cocaine" (methamphetamine) was in the plastic container, but he denied that it belonged to him. (T.16) During that interview, he did not name the person to whom the drug belonged. He admitted ownership of all the other items found in the wooden crate with the exception of the plastic container and a pair of sunglasses. (T.16) The second time Charlton was questioned, he denied knowing anything about the marijuana that was found in an ashtray located on a

table in his living room or the methamphetamine. (T.17).

At his trial, Charlton testified he was unaware of the presence of the methamphetamine in his house, and he denied telling the police otherwise. Several witnesses appeared on his behalf and testified they had helped move the wooden crate on which the methampetamine was found to the Petitioner's home several months before his arrest.

ARGUMENT

1. WHETHER THE PETITIONER'S CONVICTION OF POSSESSION OF METHAMPHETAMINE VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT BECAUSE THE EVIDENCE AGAINST HIM INCLUDED AN ADMISSION THAT, WHILE THE DRUG WAS NOT HIS, HE KNEW IT WAS IN HIS HOUSE.

Petitioner contends that his conviction for possession of methamphetamine violated the due process clause of the 14th Amendment to the United States Constitution. In support of this contention, he alleges that the only direct evidence tying him to the drug was his statement when he was arrested that he knew the methamphetamine was in his house. Charlton maintains that this admission was insufficient to establish his guilt beyond a reasonable doubt. Charlton does not elaborate why his conviction based on this evidence violates his 14th Amendment right to due process.

The due process clause of the 14th Amendment has frequently been invoked by this Court in ruling on the admissibility of confessions. The constitutional questions raised in these cases have

concerned the voluntariness of confessions. See, e.g.,Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 42 Ed. 2d 242 (1960). The issue raised by Charlton, that his confession was insufficient evidence upon which to find him guilty of possession of methamphetamine, is completely unrelated to the 14th Amendment protection against involuntary admissions of guilt.

Furthermore, Petitioner's failure to raise this issue at the conclusion of his trial or in any of his appeals to other courts bars him from raising the issue for the first time on certiorari to the United States Supreme Court. Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232, 70 S. Ct. 14, 94 L. Ed. 22 (1949). Stergald v. United States, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

However, even if we assume that the Petitioner has properly raised a legitimate 14th Amendment question, there is no merit to his argument that the only evidence against him was his admission that he knew the methamphetamine was in his house.

The methamphetamine was discovered hidden inside a small metal canister which was itself concealed in a plastic box. This box was located in Charlton's living room on an open-topped wooden crate filled with numerous items of his personal property. A payment book for a car loan in his name was resting on the plastic container. Petitioner was alone in his house the night the methamphetamine was seized.

Except for his girlfriend's testimony - that she frequently stayed there, there was no evidence that anyone other

than Charlton lived in the house. The girlfriend denied any knowledge of the methamphetamine.

This circumstantial evidence, coupled with the Petitioner's admission he knew the drug was in his house, clearly warranted the trial court's guilty verdict.

2. WHETHER THE SEARCH OF A SMALL METAL CONTAINER EXCEEDED THE SCOPE OF THE SEARCH WARRANT AND, THEREFORE, WAS AN UNREASONABLE SEARCH IN VIOLATION OF THE 4TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Charlton alleges that the police exceeded the scope of their search warrant when they opened a metal canister in which approximately one gram of methamphetamine was concealed.

The Virginia Supreme Court has held that in executing a search warrant, police officers are entitled to investigate any area where the item identified in the search warrant could reasonably be concealed.

In adopting this rule, the Virginia court joined a growing number of state and federal courts which have held that the scope of a lawful search is determined by the description in the search warrant of the items to be seized. See, e.g., Harp v. State, 136 Ga. App. 897, 222 S.E. 2d 623 (1975).

This rule was endorsed by this Court in United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). In reversing a Court of Appeals decision invaliding a search of a container found in the defendant's car trunk, the Court held "[the scope of the search]... is

defined by the object of the search and the places in which there is probable cause to believe that it may be found". United States v. Ross, 456 U.S. at 824.

In applying this test to the facts of this case, it is first necessary to ask what items were identified in the search warrant as being the objects of the search. After we have answered that question, we can consider the larger question, to wit; whether the search of the metal container that resulted in the seizure of the methamphetamine was unlawfully broad.

Among the items of stolen property which the police suspected were in the Petitioner's house were several small pieces of jewelry. These items were identified in the search warrant as including two gold chains. The Detective

who seized the methampetamine testified that he was looking for the gold chains when he opened a canister he described as being a metal pill box, three inches in length. The Detective said he shook the canister before he opened it and determined that something was concealed inside. Only after making this discovery did he open the canister and find some loose marijuana seeds and a plastic baggie which contained methamphetamine.

The nature of the items of jewelry identified in the search warrant lent themselves to easy concealment. From the officer's description of the metal canister, it was clear that a small gold chain could easily be hidden inside it. This possibility was enhanced when the officer shook the canister and heard something rattle.

Charlton's claim that the police officer embarked on a general exploratory search the moment he opened the canister ignores both the officer's testimony concerning the objects of his search and the affidavit for the warrant which described the items he suspected were in the house. Not only is this claim unsupported by the evidence, but it would have this Court unfairly penalize the police officer for the meticulous efforts he took in conducting his search.

3. WHETHER THE PETITIONER'S CONVICTION OF A SECOND OFFENSE OF POSSESSION OF MARIJUANA VIOLATED THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Charlton contends that his conviction for possession of marijuana violated

his right to due process as guaranteed by the 14th Amendment. In support of this contention, he maintains there was insufficient evidence, first, to convict him of possession of marijuana and, second, to impose the enhanced punishment for a second offense. A review of the trial record reveals the inadequacy of each of these arguments.

More importantly, neither of these arguments involve the Petitioner's right to due process under the 14th Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that this Petition for a Writ of Certiorari to this

Honorable Court should be denied.

Respectfully submitted

COMMONWEALTH OF VIRGINIA

BY _____

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CERTIFICATE OF SERVICE

I, Stephen Givando-Cline, counsel for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of July, 1987, I mailed three copies of the foregoing Brief in Opposition to Albert L. Fary, Jr., Esquire, 218 London Boulevard, Portsmouth, Virginia 23704, Counsel for Petitioner.

BY Stephen G. Cline

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City of Chesapeake